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Real Property and Business Litigation Report

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Manuel Farach

Bair v. City of Clearwater, --- So. 3d ----, 2016 WL 4150220 (Fla. 2d DCA 2016).
Requests for additional information during a construction project do not arise to the level of a violation of the Bert Harris Act, Florida Statute section 70.001. Additionally, equitable estoppel is a defensive doctrine that may not be used offensively to seek money damages against government for blocking land development.

575 Adams, LLC v. Wells Fargo, LLC, --- So. 3d ----, 2016 WL 4132004 (Fla. 3d DCA 2016).
An owner of property may take the deposition of a foreclosing mortgagee's witness, even if the owner is a "stranger to the property" (i.e., acquired the property after the lis pendens was filed).

State of Florida, Dep't of Environmental Protection v. Beach Group Investments, LLC, --- So. 3d ----, 2016 WL 4132112 (Fla. 4th DCA 2016).
An administrative takings claim is not ripe unless the landowner has applied for a variance and been rejected.

Green Emerald Homes, LLC v. The Bank of New York Mellon, --- So. 3d ----, 2016 WL 4138237 (Fla. 4th DCA 2016).
A party seeking to serve a limited liability company pursuant to Florida Statute section 608.463(1)(a) must perform a diligent search for the person to be served before serving by constructive service, i.e., the serving party must do more than merely attempting to serve the registered agent.

Pro Finish, Inc. v. Estate of All American Trailer Manufacturers, Inc., --- So. 3d ----,2016 WL 4132721 (Fla. 4th DCA 2016).
Assignee under Florida's Assignment for Benefit of Creditors Act, Florida Statutes Chapter 727, must strictly comply with the time frames set forth in the Act (including petitioning the trial court for the establishment of the assignment within ten days and publishing for one month) and failure to do so renders the assignment proceedings invalid.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DAVID BAIR and AILEEN BAIR,

Appellants,

v.

CITY OF CLEARWATER, FLORIDA,

Appellee.

Case No. 2D15-1210

Opinion filed August 5, 2016.

Appeal from the Circuit Court for Pinellas County; Jack Day, Judge.

Jeffrey W. Gibson and Ashley R. Kellgren of Macfarlane Ferguson & McMullen, Tampa; and Joshua Magidson and Nancy S. Paikoff of Macfarlane Ferguson & McMullen, Clearwater, for Appellants.

Jeffrey L. Hinds and Jay J. Bartlett of Smolker, Bartlett, Loeb, Hinds & Sheppard, P.A., Tampa; and Paul Richard Hull, Assistant City Attorney, Clearwater, for Appellee.

MORRIS, Judge.

David and Aileen Bair appeal a final judgment entered against them in their complaint against the City of Clearwater for claims of equitable estoppel and for relief pursuant to the Bert J. Harris, Jr., Private Property Rights Protection Act (Bert

Harris Act).[1] The underlying action arose after the City issued a stop-work order relating to modifications and improvements that the Bairs were making to their home pursuant to a permit that the City had previously issued. The stop-work order was based on the City's determination that the cost of the modifications and improvements exceeded 50 percent market value of the Bairs' home and, therefore, that the Bairs were required to bring the home into compliance with current flood prevention requirements before construction could resume. Because we agree with the trial court that the equitable estoppel claim was not a cognizable stand-alone cause of action and that the City's application of its ordinances in this case did not give rise to a cognizable Bert Harris Act claim, we affirm.

BACKGROUND

The Bairs purchased their waterfront home on Clearwater Beach in 2008. A 2003 Flood Insurance Rate Map indicates that the property sits below the 100-year elevation in a "V" flood zone.

In 2011, the Bairs submitted an application for a permit to remodel the home as well as to add an addition onto the home. Because the property was located in a flood zone, the Bairs were required to comply with section 51.03 of the City of Clearwater's Development Code (the City Code) and relevant Federal Emergency Management Agency (FEMA) regulations regarding flood damage resistance requirements for any substantial improvements made to the home. This meant that if substantial improvements were made, the structure was required to be elevated so that the bottom of the lowest horizontal part of the structure would be at or above the base

[1] § 70.001, Fla. Stat. (2011).

flood elevation level. "Substantial improvements" as defined by the City Code and FEMA regulations are modifications or improvements to a structure made during a one-year period that equal or exceed 50 percent of the market value of the structure before the modifications or improvements commenced. Structures are not required to be elevated at or above the base flood elevation level if the modifications or improvements are nonsubstantial.[2]

The City reviewed the Bairs' permit application and requested that the Bairs submit an application for nonsubstantial improvements. As part of the application, the Bairs were required to obtain an appraisal to determine the market value of their home prior to any improvements being made. The purpose of the appraisal was to provide a benchmark to determine whether the Bairs' proposed improvements could be classified as nonsubstantial, thereby excusing them from the requirement to elevate their home. The Bairs complied with the City's request in June 2011. The Bairs' application included an affidavit from an engineer attesting to the scope and cost of the work to be performed, a 2010 appraisal report, and a budget for the proposed improvements and addition to their home. The Bairs represented in their application that the cost of the proposed improvements and addition would not exceed 50 percent of the market value of the structure that existed before the commencement of construction. Based on the application, the City issued the permit.

In August 2011, the Bairs began construction on their home, which included a partial demolition. However, nine days after construction commenced, the

[2]In coastal developments, this requirement relating to substantial and nonsubstantial improvements is known as the "50 percent Rule."

City issued a stop-work order pursuant to chapter 51 and section 47.001 of the City Code on the basis that the partial demolition was so extensive that the City believed the improvements and addition would exceed 50 percent of the market value of the pre-existing structure.

Thereafter, the Bairs engaged in conversations with the City in an effort to have the stop-work order lifted. Eventually, the Bairs submitted revised plans showing that while the cost of the project had increased, the size and scope of the project had been scaled back. The Bairs also submitted a revised appraisal which relied on a cost valuation approach; that approach was different from the market value approach used in the initial appraisal report. The new valuation methodology allowed for an increase in the Bairs' construction budget while still allowing them to comply with the 50 percent Rule.

However, even with the revised plans and second appraisal, the City was not convinced that the improvements and addition could be completed within the scope of the nonsubstantial improvements permit. Thus, the City refused to lift the stop-work order. The Bairs appealed to the City's Building/Flood Board of Adjustment and Appeals which ultimately affirmed the City's decision to leave the stop-work order in effect.

In March 2013, the Bairs filed a two-count complaint against the City. Count I sought relief pursuant to the Bert Harris Act, and count II sought damages based on an equitable estoppel theory. In response, the City filed a motion to dismiss and an alternative motion for summary judgment as to the equitable estoppel claim, arguing that there was no freestanding claim for equitable estoppel but even if there

was, the Bairs are precluded from seeking monetary relief. The City also sought summary judgment on the Bert Harris Act claim, arguing that because the stop-work order was predicated on the application of ordinances that were enacted on or before May 11, 1995, the Bert Harris Act did not apply. The trial court ultimately granted the motion to dismiss the equitable estoppel claim as well as the motion for summary judgment on the Bert Harris Act claim. Final judgment was entered in favor of the City, and this appeal now follows.

ANALYSIS

I. The Bert Harris Act claim

We review the trial court's order granting final summary judgment de novo. See Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). Issues involving statutory interpretation are also reviewed de novo. Borden v. East-European Ins. Co., 921 So. 2d 587, 591 (Fla. 2006). Summary judgment is properly entered only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Aberdeen at Ormond Beach, L.P., 760 So. 2d at 130.

In interpreting a statute, we must primarily look to the plain language of the statute at issue. J.W. v. Dep't of Children & Family Servs., 816 So. 2d 1261, 1263 (Fla. 2d DCA 2002). If the statute is clear and unambiguous, we need not resort to rules of statutory interpretation; rather, we give the statute "its plain and obvious meaning." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (quoting A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931)). The Bert Harris Act contains a very narrow

waiver of sovereign immunity, see § 70.001(13), and such waiver statutes are strictly construed, see Spangler v. Fla. State Turnpike Auth., 106 So. 2d 421, 424 (Fla. 1958).

Section 70.001(13) provides in relevant part that "the state, for itself and for its agencies or political subdivisions, waives sovereign immunity for causes of action based upon the application of any law, regulation, or ordinance subject to this section, but only to the extent specified in this section." Section 70.001(12) clarifies that there is no cause of action against a governmental entity under the Bert Harris Act "as to the application of any law enacted on or before May 11, 1995, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date." Thus there is no waiver of sovereign immunity for actions that fall within the scope of section 70.001(12). However, there is an exception where a law, rule, regulation, or ordinance has been amended after May 11, 1995, and the application of the amended language "imposes an inordinate burden apart from the law, rule, regulation, or ordinance being amended." § 70.001(12). The ordinances at issue here—City Code section 47.001 and the applicable portions of chapter 51—were adopted on or before May 11, 1995, and neither section 47.001 nor the relevant portions of chapter 51 have been revised after that date.

Yet the Bairs argue that their Bert Harris Act claim against the City was substantially broader than the mere application of an ordinance. Specifically, they contend that the Bert Harris Act claim was based on other actions by the City that inordinately burdened their property such as the City making ongoing requests for additional information and requests for revisions to plans and the City changing its position on issues. The Bairs also assert that certain provisions in chapter 51 require

the City to rely on post-1995 information such as flood insurance rate maps and studies, and they argue that because the City relied on FEMA regulations in determining that the construction exceeded the 50 percent Rule, the City's conduct was not limited to simply applying the pre-1995 City Code. Finally, the Bairs maintain that the purpose and intent of section 70.001(12) is to preclude claims based on pre-1995 application of laws, rules, regulations, or ordinance, but they argue that it was never intended to bar claims based on governmental actions taken on a permit that was issued well after May 11, 1995. Based on these arguments, the Bairs contend that there was a genuine issue of material fact as to whether section 70.001(12) applied.

The Bairs' first argument—that the City's other actions beyond the mere application of the City Code inordinately burdened the Bairs' property—is based on the Bairs' interpretation of section 70.001(2) which provides for a cause of action "[w]hen a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property." The Bairs assert that because section 70.001(2) does not limit causes of action to instances where a city has applied a law, rule, regulation, or ordinance, their Bert Harris Act claim is not barred in its entirety by section 70.001(12). However, the limited waiver of sovereign immunity found in section 70.001(13) applies only where a governmental entity has *applied* a law, rule, regulation, or ordinance as specified. And in the statement of legislative intent found in section 70.001(1), the legislature recognized that it was the *application* of laws, regulations, and ordinances that sometimes inordinately burden real property, not ongoing requests for information, requests for revisions to plans, or a governmental entity's change in position. Other subsections in section 70.001 likewise refer to the

application of a law or regulation. See § 70.001(3)(e)(2), (4)(d), (11). In determining legislative intent based on the plain language of a statute, we read the statute as a whole. Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC, 986 So. 2d 1260, 1265 (Fla. 2008). Based on our reading of section 70.001 in its entirety, valid Bert Harris Act claims are predicated on the application of laws, rules, regulations, or ordinances. Consequently, the Bairs' attempt to broaden their claim to evade the protection afforded to the City under section 70.001(12) fails. No genuine issue of material fact was created by this assertion.

The Bairs' second argument—that the City relied on portions of chapter 51 that were amended after May 11, 1995, as well as FEMA regulations—likewise fails. The City never argued that it had authority to administer or apply FEMA regulations, and therefore, there was no genuine issue of material fact as to whether it applied something beyond a law, rule, regulation, or ordinance of this state or a political entity of this state. See § 70.001(1) (explaining that the Bert Harris Act was intended to provide a cause of action where the application of a law, rule, regulation, or ordinance of the state or political entity of the state affects real property). Further, even if the City had been delegated such authority by FEMA, the application of FEMA regulations would not provide a cognizable cause of action under the Bert Harris Act. See § 70.001(3)(c) (explaining that the term "governmental entity," as used when referring to actions that inordinately burden real property, does not include a municipality that "independently exercises governmental authority . . . when exercising the powers of the United States or any of its agencies through a formal delegation of federal authority").

Similarly, the fact that the City relied on post-1995 flood insurance maps and studies (as required by portions of chapter 51) in determining that the Bairs' property was within a flood zone, thus requiring the Bairs to comply with the 50 percent Rule, does not create a genuine issue of material fact as to whether a cause of action under the Bert Harris Act existed. This is because any reliance on post-1995 amended portions of chapter 51 did not inordinately burden the Bairs' property "apart from the law, rule, regulation, or ordinance being amended." § 70.001(12). Rather, the reliance on those amended portions of chapter 51 was part of the City's overall decision to require compliance with the 50 percent Rule, a rule that was enacted prior to May 11, 1995. Because the City established that there was no genuine issue of material fact regarding whether section 70.001(12) applied, the burden shifted to the Bairs to prove that there was a genuine issue of material fact regarding whether the application of any newly amended sections of chapter 51 imposed an inordinate burden on their real property. See Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979) (explaining that once a movant for summary judgment has met its burden of proving that no genuine issue of material fact exists, the burden shifts to the nonmovant to prove that such an issue does exist); Pelz v. City of Clearwater, 568 So. 2d 949, 951 (Fla. 2d DCA 1990) (citing DeMesme v. Stephenson, 498 So. 2d 673, 675 (Fla. 1st DCA 1986), for the same proposition); see also Town of Ponce Inlet v. Pacetta, LLC, 120 So. 3d 27, 29 (Fla. 5th DCA 2013) (noting that plaintiff who brought Bert Harris Act claim had burden of proving that town's actions constituted inordinate burden on plaintiff's vested right to use its property). But as we explained, the Bairs failed to meet their burden.

The Bairs' third and final argument regarding the Bert Harris Act claim—that section 70.001(12) was only intended to bar claims of application of an ordinance that occurred prior to May 11, 1995—is meritless. The plain language of section 70.001(12) provides that "[n]o cause of action exists . . . as to the application of any law enacted on or before May 11, 1995, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date." The reference to the *enactment* of an ordinance or the *adoption or formal notice for adoption* of an ordinance on or before May 11, 1995, makes it clear that the legislature intended to bar claims based on the application of grandfathered legislation, i.e., any law, rule, regulation, or ordinance that was in effect or formally noticed to be in effect on or before the specified date. If the legislature intended merely to preclude claims based on a governmental entity's application of an ordinance that occurred prior to May 11, 1995, it could have specified that no cause of action existed for any application of a law, rule, regulation, or ordinance that occurred prior to that date. But by its terms, section 70.001(12) precludes claims for the application of an ordinance that was in effect prior to May 11, 1995, without regard to when the application of the ordinance occurred.

The Bairs contend that such an interpretation essentially eviscerates the purpose of the Bert Harris Act. We do not agree. Section 70.001(12) still allows for a cause of action to be brought where a pre-May 11, 1995, ordinance has been amended if the amended language "imposes an inordinate burden apart from the . . . ordinance being amended." This exception makes it clear that the legislature intended to preclude claims based on grandfathered legislation but to allow claims based on newly imposed

requirements that inordinately burden real property. The purpose of the Bert Harris Act is thus still being served.

The City met its burden of proving that there was no disputed issue of material fact that section 70.001(12) applied to bar the Bert Harris Act claim, while the Bairs failed to prove that such an issue existed. Accordingly, summary judgment was properly granted on the Bert Harris Act claim.

II. Equitable Estoppel Claim

We review the trial court's order dismissing the equitable estoppel claim with prejudice under a de novo standard. Belcher Ctr., LLC v. Belcher Ctr., Inc., 883 So. 2d 338, 339 (Fla. 2d DCA 2004). When reviewing a motion to dismiss for failure to state a cause of action, the trial court is limited to the four corners of the complaint, and if the court is required to consider matters outside the four corners of the complaint, then the claim may not be dismissed on the basis of an affirmative defense. See id.

The trial court correctly dismissed the Bairs' claim for damages under a theory of equitable estoppel. Florida courts recognize that equitable estoppel may be invoked against a governmental entity as a supporting theory for some other remedy. See Pacetta, LLC, 120 So. 3d at 29-30 (recognizing that equitable estoppel may be invoked to support a Bert Harris Act claim if a property owner relies in good faith upon the governmental action in question); cf. State, Agency for Health Care Admin. v. MIED, Inc., 869 So. 2d 13, 21 (Fla. 1st DCA 2004) (rejecting plaintiff's equitable estoppel claim where it was brought as a stand-alone cause of action "rather than as a supporting theory for some other equitable remedy"). However, this court and others hold that "equitable estoppel is a defensive doctrine rather than a cause of action." Angelo's

Aggregate Materials, Ltd. v. Pasco County, 118 So. 3d 971, 973 n.3 (Fla. 2d DCA 2013) (quoting Meyer v. Meyer, 25 So. 3d 39, 43 (Fla. 2d DCA 2009)); MIED, Inc., 869 So. 2d at 20; see also Watson Clinic, LLP v. Verzosa, 816 So. 2d 832, 834 (Fla. 2d DCA 2002) (explaining that appellee raised equitable estoppel as an affirmative defense). This principle is logical because equitable estoppel is designed to prevent a loss rather than to aid a party from gaining something. See Meyer, 25 So. 3d at 43; MIED, Inc., 869 So. 2d at 20; see also Major League Baseball v. Morsani, 790 So. 2d 1071, 1077 (Fla. 2001) (explaining that by definition and usage, equitable estoppel " 'estops' or bars a party from asserting something (e.g., a fact, a rule of law, or a defense) that he or she otherwise would be entitled to assert").

We recognize that other courts appear to allow equitable estoppel to be invoked offensively in order to avoid an opposing party's defense. See Judkins v. Walton County, 128 So. 3d 62, 65 (Fla. 1st DCA 2013) (noting that appellant may have been able to avoid statute of limitations defense by pleading and proving equitable estoppel); Castro v. Miami-Dade Cty. Code Enf't, 967 So. 2d 230, 233 (Fla. 3d DCA 2007) (quashing circuit court order where circuit court failed to apply equitable estoppel offensively to estop county from enforcing set-back requirements ordinance); Bruce v. City of Deerfield Beach, 423 So. 2d 404, 406 (Fla. 4th DCA 1982) (concluding that equitable estoppel might be available to avoid defense of failure to exhaust administrative remedies). But that is not how the Bairs attempted to apply the doctrine in this case. Rather, they brought a stand-alone claim of equitable estoppel seeking monetary damages. The Bairs stipulated to this fact in the trial court. As a result, they

are bound to their stipulation. Gunn Plumbing, Inc. v. Dania Bank, 252 So. 2d 1, 4 (Fla. 1971); Lotspeich Co. v. Neogard Corp., 416 So. 2d 1163, 1165 (Fla. 3d DCA 1982).

The Bairs now seek to avoid their stipulation by labeling it as a fact outside the record that the trial court was not permitted to consider on the City's motion to dismiss. But this argument was not made below, and therefore, the Bairs are procedurally barred from raising this argument for the first time on appeal. Dade Cty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999). The Bairs argue that the procedural bar should not apply because they were not aware that the trial court was considering matters outside the record until they received the trial court's order. However, even while acknowledging the stipulation in the trial court, the Bairs had the opportunity to make the same argument to the trial court that they make on appeal: the stipulation was not a proper consideration in determining whether a stand-alone claim existed because it was a fact outside the record. And even if they could not have anticipated that the trial court would rely on the stipulation in dismissing the claim, the Bairs could have made the argument in a motion for rehearing of the final judgment. Yet no such motion was filed. Consequently, there is no reason to excuse the Bairs from preserving this issue with the trial court before raising this issue on appeal.

Because there is no basis in the law for a stand-alone claim of equitable estoppel seeking monetary damages and because the Bairs stipulated that that is the only relief they were seeking in count II of their complaint, the trial court correctly determined that the claim failed to state a cause of action.

CONCLUSION

We hold that the City established that there was no genuine issue of material fact that section 70.001(12) applied to bar the Bairs' Bert Harris Act claim and, therefore, that the trial court properly granted summary judgment on that claim. We likewise hold that the trial court properly dismissed the equitable estoppel claim for failure to state a cause of action. Accordingly, the judgment of the trial court is affirmed.

Affirmed.

VILLANTI, C.J., and WALLACE, J., Concur.

Third District Court of Appeal

State of Florida

Opinion filed August 03, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-1240
Lower Tribunal No. 14-9285

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575 Adams, LLC,
Petitioner,

vs.

Wells Fargo Bank, N.A., etc.,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, John Schlesinger, Judge.

Neustein Law Group, P.A., and Nicole R. Moskowitz, for petitioner.

Marinosci Law Group, P.C., and Bart Heffernan (Fort Lauderdale), for respondent.

Before SUAREZ, C.J., and ROTHENBERG and FERNANDEZ, JJ.

ROTHENBERG, J.

575 Adams, LLC ("575 Adams") seeks a writ of certiorari quashing the trial court's order granting Wells Fargo Bank's ("Wells Fargo") motion for a protective order, which prevents 575 Adams from deposing the only witness listed to testify on Wells Fargo's behalf, Nathan Shue ("Shue"), Wells Fargo's servicer's corporate representative. For the following reasons, we grant the petition and quash the trial court's protective order.

Wells Fargo filed a mortgage foreclosure action against 575 Adams and others. 575 Adams was not a signatory to the promissory note or mortgage but is the owner of the subject property by a quit claim deed, which was filed prior to the filing of the instant foreclosure action. Wells Fargo listed only one witness on its witness list, Shue, who Wells Fargo stated had "personal knowledge as to verification of the business records of the subject loan, including the Note and Mortgage, payment history, breach letter, other documents pertaining to this loan, as well as standing and capacity, and the amounts due and owing, and other matters relating to the subject loan default or in response to defenses, as necessary."

575 Adams filed a motion to compel the deposition of Shue after several unsuccessful attempts to coordinate a deposition with Wells Fargo. In its motion to compel, 575 Adams argued that Shue's testimony at trial would directly relate to its defenses, including lack of standing, notice, and conditions precedent. Thus, the

inability to depose Shue would greatly prejudice 575 Adams's ability to present an adequate defense at trial. In response, Wells Fargo filed a motion for a protective order, claiming that because 575 Adams was not a signatory to the note or mortgage, it was not entitled to take Shue's deposition or raise certain affirmative defenses.

At a hearing on the two motions, the trial court acknowledged that 575 Adams could raise the affirmative defense that Wells Fargo lacked standing, but stated that it had not yet read the parties' motions and reserved ruling.[1] Thereafter, the trial court entered a cursory order granting Wells Fargo's motion for a protective order, stating that 575 Adams was a "stranger to the mortgage and note." 575 Adams filed the instant petition for writ of certiorari to challenge the trial court's protective order.

A non-final discovery order may be reviewed by certiorari only if the contested order (1) results in a material injury (2) that cannot be remedied on postjudgment appeal and (3) departs from the essential requirements of law. Bd. of Trs. of Internal Improvement Trust Fund v. Am. Educ. Enters., LLC, 99 So. 3d 450, 454 (Fla. 2012); Racetrac Petroleum, Inc. v. Sewell, 150 So. 3d 1247, 1251 (Fla. 3d DCA 2014).

[1] The record on appeal does not contain a transcript of the hearing, but 575 Adams has filed a brief statement of the proceedings that was approved by the trial court. See Fla. R. App. P. 9.200(b)(4).

The first two requirements are satisfied because Shue is a material witness, and as this Court has previously stated, "an order prohibiting the taking of a material witness's deposition inflicts the type of harm that cannot be remedied on final appeal." Marshall v. Buttonwood Bay Condo. Ass'n, 118 So. 3d 901, 903 (Fla. 3d DCA 2013). Additionally, we find that the trial court's protective order departed from the essential requirements of law because it failed to make a finding of good cause to prohibit 575 Adams from deposing Wells Fargo's material witness. Id.; Medero v. Fla. Power & Light Co., 658 So. 2d 566, 567 (Fla. 3d DCA 1995) (holding that a "trial court has the right to deny discovery **upon a showing of good cause**") (emphasis added); see also Fla. R. Civ. P. 1.280(c).

The trial court's statement that 575 Adams was a "stranger to the note and mortgage," without more, cannot constitute a finding of good cause to issue its protective order prohibiting 575 Adams from deposing Shue. While 575 Adams might not be a party to the note and mortgage, neither Wells Fargo nor the trial court have explained why that finding amounts to good cause to forbid the owner of the property being foreclosed upon from deposing the only witness listed to testify on Wells Fargo's behalf. Additionally, the trial court stated that 575 Adams could raise lack of standing as an affirmative defense, and Wells Fargo admitted in its witness list that Shue had personal knowledge of Wells Fargo's standing. Therefore, 575 Adams has a legitimate ground to depose Shue, as his testimony is

relevant to an affirmative defense, and there is nothing in the record to suggest that a deposition of Shue would be cumulative, abusive, or frivolous.

In conclusion, because the trial court's protective order prohibited 575 Adams, a defendant in the foreclosure litigation and the owner of the subject property, from deposing a material witness, and because neither the protective order under review nor the record on appeal suggest that the trial court found good cause to enter the protective order, we grant the petition for writ of certiorari, quash the trial court's protective order, and remand for proceedings consistent with this opinion.

Petition granted; order quashed; remanded.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Appellant,

v.

BEACH GROUP INVESTMENTS, LLC,
Appellee.

No. 4D14-3307

[August 3, 2016]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Dwight L. Geiger, Judge; L.T. Case No. 2011-CA-000702.

Craig D. Varn, General Counsel, and Jeffrey Brown, Deputy General Counsel, Tallahassee, for appellant.

Philip M. Burlington of Burlington & Rockenbach, P.A., West Palm Beach, and Ethan J. Loeb, David Smolker and Jon P. Tasso of Smolker, Bartlett, Schlosser, Loeb & Hines, P.A., Tampa, for appellee.

MAY, J.

The Department of Environmental Protection ("DEP") appeals an adverse judgment for a regulatory taking. It argues the trial court erred in concluding: (1) the claim was ripe; and (2) the DEP had "taken" the property. We agree with the DEP on the ripeness issue and reverse.

The property consists of approximately 2.2 acres of land in Fort Pierce, which lies between Ocean Drive and the Atlantic Ocean, south of the Fort Pierce Inlet. The inlet is protected by two jetties that extend into the Atlantic Ocean. The jetties and inlet channel cause beach erosion south of the inlet.

Congress authorized beach nourishment south of the inlet, which began in 1971, has continued since then, but will expire in 2021. The beach nourishment has saved the property from erosion. There is no expectation that the inlet or jetties will be removed. It is expected that continued beach nourishment will be needed.

In January 2004, Beach Group Investments, LLC ("Beach Group") purchased the property for $2.4 million. In July 2005, Ocean Breeze Townhomes, LLC ("Ocean Breeze") contracted to purchase the membership interests in Beach Group for $8,718,440. The contract provided that Ocean Breeze would pay approximately $2,155,891 and, as the new owner of Beach Group, issue a promissory note to Beach Group Holdings, LLC for $6,468,440. Beach Group sought to build a high-end seventeen-unit townhome project.

Florida's Beach and Shore Preservation Act mandates the establishment of "coastal construction control lines" ("CCCL"), which "define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions." § 161.053(1)(a), Fla. Stat. Once a CCCL is established, no construction seaward of it may occur without first obtaining a CCCL permit from the DEP. *See id.* § 161.053(4).

Pursuant to section 161.053(5)(b), the DEP may not issue CCCL permits for a structure in a location that is "based on the [DEP]'s projections of erosion in the area, . . . seaward of the seasonal high-water line within 30 years after the date of application for the permit. The procedures for determining such erosion shall be established by rule." *Id.* § 161.053(5)(b). Pursuant to section 161.053(20), the "[DEP] may adopt rules related to the establishment of [CCCLs]; activities seaward of the [CCCL]; exemptions; property owner agreements; delegation of the program; permitting programs; and violations and penalties." *Id.* § 161.053(20).

Rule 62B-33.024 of the Florida Administrative Code ("FAC") sets forth the DEP's current "Thirty-Year Erosion Projection Procedures."

> A 30-year erosion projection is the projection of long-term shoreline recession occurring over a period of 30 years based on shoreline change information obtained from historical measurements. A 30-year erosion projection of the seasonal high water line (SHWL) shall be made by the [DEP] on a site specific basis upon receipt of an application with the required topographic survey, pursuant to Rules 62B-33.008 and 62B-33.0081, F.A.C., for any activity affected by the requirements of Section 161.053(5), F.S.

Fla. Admin. Code R. 62B-33.024(1).

Subsection (2)(d) regulates "[b]each nourishment or restoration projects." *Id.* § 62B-33.024(2)(d). Under that section, "The [Mean High Water Line] MHWL to SHWL[1] distance landward of the erosion control line (ECL) shall be determined. If the ECL is not based on a pre-project survey MHWL, then a pre-project survey MHWL shall be used instead of the ECL." *Id.* § 62B-33.024(2)(d)3. The ECL is "the line . . . which represents the landward extent of the claims of the state in its capacity as sovereign titleholder of the submerged bottoms and shores of the Atlantic Ocean." § 161.151(3), Fla. Stat.

Because the project was seaward of the CCCL, Beach Group had to obtain a permit. To get the permit, the project had to be on the landward side of the thirty-year erosion projection line. The thirty-year erosion projection line is calculated using a five-step process. The ECL, MHWL, SHWL, and the erosion projection rate are all used in the calculation.[2] Under step one, it is necessary to locate the pre-nourishment project MHWL.

When the original Beach Group bought the property in January 2004, the thirty-year erosion projection calculation rule set the MHWL, the starting point, at the ECL. However, the DEP amended its thirty-year erosion projection rule in June 2004 (before Ocean Breeze purchased the membership interest in Beach Group). The new rule provided: "If the ECL is not based on a pre-project survey MHWL, then a pre-project survey MHWL shall be used instead of the ECL."

This amendment resulted in a change of the location of the MHWL step-one starting point. The further landward the starting point, the further landward the thirty-year erosion projection line, which left less land available for development. The rule change resulted in the DEP's denial of Beach Group's CCCL permit because the project was seaward of the thirty-year erosion projection line. Beach Group's position was that under the previous step-one calculation method (using a 1997 ECL), which it believed the DEP used beyond the rule amendment date, the project would

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[1] The SHWL is "the line formed by the intersection of the rising shore and the elevation of 150 percent of the local mean tidal range above local mean high water." § 161.053(5)(a)2., Fla. Stat.

[2] Different lines are involved in the calculation: (1) Erosion Control Line ("ECL"); (2) Mean High Water Line ("MHWL"); (3) Seasonal High Water Line ("SHWL"); (4) line of continuous construction; (5) Coastal Construction Control Line ("CCCL"); and (6) thirty-year erosion projection line.

have been landward of the thirty-year erosion projection line and its CCCL permit would have been approved.

Beach Group's Application Process

Prior to closing on the 2005 property purchase contract, Ocean Breeze (now Beach Group) met with "numerous professionals," including a land planner, civil engineer, and architect. Ocean Breeze reviewed its site plan with the city commissioners, each of whom expressed enthusiasm.

Ocean Breeze hired Michael Walther ("Walther") of Coastal Technologies ("Coastal Tech") to evaluate the likelihood of obtaining a CCCL permit for the property. If the proposed project was seaward of the thirty-year erosion projection line, the DEP would not issue a CCCL permit. Walther relied on the 1997 ECL as the step-one starting point and opined that it was the DEP's practice to use it.

Prior to the July 2005 property acquisition, Coastal Tech informally provided an analysis to the DEP, requesting its approval. Coastal Tech staff emailed Harold Seltzer, a member of Beach Group ("Beach Group Seltzer"), and told him they spoke with the DEP, which said "the line of continuous construction looks good, our structure is landward of that line." According to Walther, there was no need for a more formal pre-application conference with the DEP prior to submitting the application because the DEP had been using the 1997 ECL as the starting point in calculating the thirty-year erosion projection line.

After closing in July 2005, Beach Group submitted its plans and applications for a driveway access permit and environmental resource permit to the City of Fort Pierce, which approved them. In December 2005, Beach Group submitted a formal CCCL permit application to the DEP.

In February 2006, the Coastal High Hazard Study Committee issued its final report ("Report"), recommending that the DEP strengthen setback requirements for the CCCL permit program. It recognized that "[s]trengthening the setbacks within the CCCL permitting program may result in economic impacts, both by restricting a property owners' ability to construct on a parcel and to the State through potential increased takings claims."

In April 2006, DEP engineer Emmett Foster ("Foster") concluded that Beach Group's application was a "certain denial." In June 2006, the DEP explained to Beach Group that its major structures might be seaward of the thirty-year erosion projection line. It suggested that Beach Group

redesign the project to be landward.

In August 2006, the DEP provided Beach Group with its analysis, which recommended using a 2002 survey's MHWL (the most landward-known survey line) in its thirty-year erosion projection calculation. Beach Group Seltzer testified that at a September 2006 meeting, the DEP "politely listened to what [Walther] had to say and then very quickly made it clear that they disagreed with [his] analysis entirely and that they had no intention to issue the permit, that they were going to deny the permit." According to Beach Group Seltzer: "[m]y understanding was that the variance would have been submitted and decided upon by the very people who had just finished telling us in four-part harmony that they were absolutely under no circumstances going to issue us a permit." Walther felt he could do nothing else to change the DEP's mind.

Coastal Tech's report noted, "the D[EP] will not 're-visit' its analysis of the 30-year SHWL." It also noted that for the DEP to approve the project as currently planned, applicants would have to "submit a variance request that is subsequently approved by the D[EP] (Note: A variance request may or may not be approved by the D[EP])." But, Walther did not believe the DEP would adopt a variance based on a conversation he had with the DEP staff.

In November 2006, the DEP notified Beach Group that its CCCL permit application was denied based on its determination that the project was seaward of its thirty-year erosion projection line. The DEP also found the project was not designed to minimize adverse impacts to the dune system. Beach Group petitioned for an administrative hearing.

An administrative law judge ("ALJ") conducted a hearing, and in April 2007, issued an order recommending denial of Beach Group's CCCL permit application because the "[p]roject extends seaward of the 30-year erosion projection." The ALJ performed the five-step analysis under Rule 62B-33.024. The ALJ rejected Walther's and Foster's recommendations[3] for the pre-nourishment MHWL, finding the starting point should be the line depicted in a 1968 pre-project survey. This was because the project included beach nourishment efforts that started in 1971 and continued through the present. The thirty-year erosion projection line was much closer to Foster's projection than Walther's.

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[3] Walther recommended using the 1997 ECL and the Foster recommended using the 2002 MHWL survey because he did not consider the 1997 ECL to be an appropriate pre-project ECL.

The ALJ also recommended:

> The likelihood of continued beach nourishment south of the inlet for the foreseeable future might be appropriate for consideration in the context of a request for a variance or waiver under Section 120.542, Florida Statutes. . . . A variance or waiver must be pursued through a separate proceeding.

The DEP entered a Final Order adopting the ALJ's recommended thirty-year erosion projection line and denying Beach Group's CCCL permit application. The DEP adopted and incorporated the ALJ's Recommended Order subject to the DEP's ruling on exceptions. It also noted: "This denial should not be construed as a statement of denial of any development potential for the subject parcel. The D[EP] is denying the specific proposal based upon the information submitted by the applicant and evidence presented at hearing." The order also included the ALJ's recommendation for Beach Group to pursue a variance.

In 2010, Beach Group lost the property to its lender in separate litigation, and a personal judgment was entered against Beach Group Seltzer, who guaranteed the loan. In March 2011, Beach Group filed a complaint against the DEP for an as-applied regulatory taking. It alleged that it purchased the property in May 2005 "with the intention of developing it consistent with City land use and zoning regulations with luxury, oceanfront townhomes and to sell the townhomes."

The DEP moved to dismiss the complaint for lack of ripeness, which the trial court denied. The DEP answered and asserted affirmative defenses, including that the claim was not ripe because there may be other permissible uses of the property, and Beach Group failed to apply for a waiver or variance. It moved for summary judgment on ripeness, which the court denied. The case proceeded to a non-jury trial.

Tony McNeal, the DEP's program administrator for the CCCL permit program ("DEP Administrator McNeal"), testified that the DEP believed Beach Group's project failed to meet the requirements of the statute and rules. He suggested that the DEP could have granted a variance from its rule addressing calculation of the erosion projection. "A variance is not available from the statute, but it is from the rule, and again, the announcement is consistent with the rule, so they could have got a variance from the rule and made it consistent with the statute."

DEP Administrator McNeal was questioned on a series of emails

between him and the new property owner in 2010. The new property owner asked if there was "[a]ny opportunity for [a] variance to accommodate prior plan of 2004," to which DEP Administrator McNeal responded: "As stated in my e-mail below 'The DEP cannot issue permits for major structures except certain single-family dwellings located seaward of said line.' This is state law, which you cannot obtain a variance from."

Per a 1999 memo, the DEP indicated that the 1997 ECL was the starting point for the thirty-year erosion projection line. An internal DEP memo from August 2004 (after the rule amendment) commented that another CCCL permit application met the requirements for approval and used the 1997 ECL as the starting point for its thirty-year erosion projection line.

A May 4, 2006, survey review conducted by a DEP official noted that "The Erosion Control Line (ECL) as recorded in Plat Book 37 Page 2 of the public records of St. Lucie County is the controlling and most current line." In a July 2006 email, John Poppell, a DEP staff member, notified Coastal Tech that he agreed with MHWL and SHWL values, and relied upon the 1997 ECL.

Following the non-jury trial, the court entered an order finding the DEP had taken the property ("Taking Order"). The court noted that Beach Group was alleging an as-applied regulatory taking under *Penn Central*.[4] It found the "preponderance of the evidence supports a regulatory as-applied taking . . . under *Penn Central*."

It also found "Beach Group had a distinct and reasonable expectation in the development, use and sale at a profit of a seventeen-unit townhouse condominium project, based on . . . the [DEP's] published policies and historical practices." The DEP's regulatory policy change caused Beach Group to lose this expectation, and to suffer "substantial deprivation of the economic use of its Property."[5] Beach Group had submitted a meaningful permit application, which was denied. CCCL permits were dictated by statute, not rule, and any request for a variance would have been futile.

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[4] *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).

[5] Beach Group provided expert testimony that the rule change reduced the project's profitability by 96% if a smaller project was built. Based on a six-unit condominium complex, the loss of profitability would have been 90%, which did not include the cost of land acquisition. The property had some value, but smaller developments would cause a loss.

In its incorporated findings, the court explained: "Factually, the June 1, '06 Foster memo really is a bright line change of opinion and policy by [the DEP] that would stop permit permitting at a line that had been used prior and then would dictate permitting approval only to a more landward line and would result, in this case, to denial of this permit application." It continued:

> At [the September 2006] meeting, it was very obvious there was not going to be an approval of the permit as requested. [DEP Administrator] McNeal suggested a variance. . . . Walther recommended not to pursue a variance. He was of the opinion that any variance application would be denied because of what he terms the no-budge position of the D[EP], that the Foster analysis was correct and accurately stated the policy of DEP. Mr. McDowell also had suggested to redesign the project. And another [DEP] engineer, Gene Chalecki, was of the opinion that variance would not be granted. Based upon this, no application for a variance was ever made.

The matter proceeded to a jury trial on damages. From the final judgment, the DEP now appeals.

The DEP makes two arguments as to why Beach Group's takings claim is not ripe. First, it argues Beach Group failed to request a variance; and second, Beach Group failed to pursue other reasonable avenues to develop the property. Beach Group responds that its application was not "too grandiose," and all of its applications other than the CCCL permit were approved. Its application was meaningful and the DEP denied it with finality. The DEP was not authorized to grant a variance from statutory requirements.

The DEP replies that proposed agency action does not prevent an agency from changing its mind. Its Final Order included language suggesting a variance petition was open for consideration. Beach Group could have moved the thirty-year erosion projection line seaward by showing that existing beach restoration projects would continue for a sufficient length of time.

We have de novo review of legal conclusions on ripeness. *Alachua Land Inv'rs, LLC v. City of Gainesville*, 107 So. 3d 1154, 1159 (Fla. 1st DCA 2013).

Ripeness is the threshold question in an as-applied regulatory takings

claim. *Id.* at 1158. It requires the property owner to take "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering the development plans for the property, including the opportunity to grant any variances or waivers allowed by law." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21 (2001).

Unless the permitting authority has already reached a decision on the pursuit of a variance or such a pursuit is futile, the owner is required to pursue administrative remedies to obtain a variance. *City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174, 1181 (Fla. 4th DCA 1995). Contrary to the conclusions in the Taking Order, a property owner cannot always claim that one "meaningful application," in and of itself, is enough to ripen a claim. *Alachua Land Inv'rs, LLC*, 107 So. 3d at 1163.

Where a variance is a reasonably possible means of allowing additional flexibility in the agency's permit decision, the owner must apply not only for a permit but also a variance. *See McKee v. City of Tallahassee*, 664 So. 2d 333 (Fla. 1st DCA 1995). Here, Beach Group admittedly did not apply for a variance. Had it done so, it could have argued that the 1997 ECL should have been applied or that continued beach restoration would prevent the erosion anticipated by the DEP.

The trial court erred in interpreting the governing statute. Section 120.542, Florida Statutes, makes a distinction between "variances . . . to statutes," which are prohibited, and "variances and waivers to requirements of [agency] rules," which are permitted. § 120.542(1), Fla. Stat. The trial court concluded that because the requirement to obtain a CCCL permit is statutory, the DEP could not have issued a variance. This conclusion would be correct if the question was whether the DEP could grant a variance from the requirement to obtain a permit. But, that was not the question. The DEP had the authority to issue a variance as a matter of law because it involved a site-specific exception to its usual methods of calculating the thirty-year erosion projection line. § 161.053(5)(b), (20), Fla. Stat.

Consistent with the plain language of the statute, the *methods* of determining the thirty-year erosion projection line are established by the DEP through rule adoption. § 161.053(5)(b), Fla. Stat. The DEP's erosion projection rule sets a rigid formula for calculating the expected duration of a beach restoration project. The DEP had authority to grant a variance from the requirements of that rule.

As explained in footnote 13 to the ALJ's Recommended Order:

> The likelihood of continued beach nourishment south of the inlet for the foreseeable future might be appropriate for consideration in the context of a request for a variance or waiver under Section 120.542, Florida Statutes. See Pet. Ex. 21 (identifying a variance as a possible means for the Project to be approved as it is currently proposed). A variance or waiver must be pursued through a separate proceeding.

The DEP incorporated that finding in its Final Order as the final word on its position regarding a variance.

The Final Order is final agency action. By incorporating the ALJ's separate Recommended Order, the DEP invited a variance application and even went so far as suggesting a justification for one. Given the undisputed content of the final agency action, a variance application would not have been futile. *Alachua Land Inv'rs, LLC*, 107 So. 3d at 1163 (finding case was not ripe where the municipality expressed an interest in working with the applicant); *see Shillingburg*, 659 So. 2d at 1181; *Tinnerman v. Palm Beach Cty.*, 641 So. 2d 523, 526 (Fla. 4th DCA 1994).

Here, the DEP issued a Final Order incorporating the ALJ's written conclusions, including his observation that the likelihood of continued nourishment projects "might be appropriate for consideration" if Beach Group applied for a variance. Simply put, the DEP provided Beach Group with the opportunity to apply for a variance. But, Beach Group did not seize that opportunity, depriving the DEP from exercising its authority to grant a variance.

The case was not ripe for a second reason: Beach Group did not propose an alternative development plan. Its planner testified that based on the location of the DEP's erosion projection, it still would have been possible to develop a project on the property with six to ten units, with similar units sizes as the proposed *Allegria* project (albeit with differing amenities), and up to fifteen smaller units with fewer amenities. And, Beach Group's former attorney suggested a single-family residence as an alternate development on the property.

The record reflects that Beach Group could have considered alternative plans for the property. "[T]he mere fact that the denial of a permit deprives a property owner of a particular use the owner deems most profitable or preferable does not demonstrate a taking." *Alachua Land Inv'rs, LLC*, 107 So. 3d at 1159; *see MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 353 n.9 (1986); *Leto v. State of Fla. Dep't of Envtl. Prot.*, 824 So. 2d 283, 285 (Fla. 4th DCA 2002).

The purpose of the ripeness requirement is to reach certainty regarding the nature and magnitude of restrictions that a permitting agency has imposed on the property owner. There is no dispute that Beach Group did not apply for an available variance. There is no dispute that Beach Group did not pursue an alternative project.

We do not address the secondary "taking" issue as it is unnecessary to our holding. We reverse and remand the case for proceedings consistent with this opinion.

Reversed and Remanded for further proceedings consistent with this opinion.

WARNER and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

GREEN EMERALD HOMES, LLC,
Appellant,

v.

THE BANK OF NEW YORK MELLON, f/k/a **THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF CWABS INC., ASSET-BACKED CERTIFICATES, SERIES 2006-26,**
Appellee.

No. 4D15-848

[August 3, 2016]

Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Eli Breger, Judge; L.T. Case No. 2014CA002777XXXXMB.

Brian M. Becher of Shapiro, Blasi & Wasserman, P.A., Boca Raton, for appellant.

Gina L. Bulecza, Jacksonville, for appellee.

WARNER, J.

Appellant Green Emerald Homes, LLC, appeals an order of the trial court denying its amended motion to quash service of process in a mortgage foreclosure proceeding filed by Bank of New York Mellon. The Bank resorted to constructive service by publication when the process server could not serve the resident agent at the company's designated address. The court denied the motion, concluding that the Bank only needed to attempt service at the company's designated address before resorting to constructive service. Because the statutes governing constructive process require performance of a diligent search and inquiry as to the whereabouts of the individuals who could bind the company, and no such search was performed, we reverse the order denying appellant's motion to quash.

Upon the filing of the foreclosure complaint, the Bank sought to serve appellant, a limited liability company. The Bank's process server attempted five times over the course of six days to serve Roberta Kaplan,

the resident agent and manager for appellant, at the company's designated address in Delray Beach. The office was closed each time, and the process server noted that there were other notices on the door of the office, indicating that other process servers had attempted service at that address. The process server then filed an affidavit of diligent search for appellant's current address. On the form affidavit, the process server checked off such things as a search of social security numbers, voter registrations, prison records, and the like—all sources of information which would apply to real persons, not a corporation or LLC. The process server did not perform an address search for Kaplan. Based upon the affidavit of diligent search, the Bank used constructive service through publication to serve appellant.

Appellant moved to quash service of process, arguing that no diligent search had been made to ascertain the whereabouts of Kaplan, the resident agent, other than service at the corporate office. Kaplan filed an affidavit stating that she was not avoiding service, and she had a homestead residence in Palm Beach County, which address was listed with the property appraiser as well as in the public records. The court held a hearing on the issue. The process server testified that he had made the five attempts to serve Kaplan at the corporate office but had made no other attempts to locate Kaplan. Interestingly, in cross-examination, the process server admitted that although he had made no attempt to serve Kaplan at any other address than the corporate address, when specifically asked whether he had attempted to serve her at her home address, he responded, "On *this case,* no." (Emphasis added).

The Bank took the position that it was not required to serve appellant at any address other than the one designated for the registered agent in the company's corporate filings, or to conduct any further search for the whereabouts of the resident agent. The trial court agreed and denied the motion, prompting this appeal.[1]

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[1] In its brief, the Bank acknowledges that the statute governing limited liability companies was recently revised by the Florida Legislature when it created a new Chapter 605, governing LLCs. However, the Bank also noted that appellant was formed prior to the effective date of that act. Therefore the provisions of Chapter 608 regarding LLCs would apply to the service in this case. We also note that the service statute was changed to specifically provide for service on LLCs. *See* § 48.062, Fla. Stat. (2015). However, the Bank did not avail itself of service pursuant to this section and used constructive service instead.

The trial court's ruling on this motion presents a pure question of law, which we review de novo. *Hernandez v. State Farm Mut. Auto. Ins. Co.*, 32 So. 3d 695, 698 (Fla. 4th DCA 2010). "Substitute service statutes are an exception to the rule requiring personal service, and . . . must be strictly construed . . . to protect a defendant's due process rights." *Clauro Enters., Inc. v. Aragon Galiano Holdings, LLC*, 16 So. 3d 1009, 1011 (Fla. 3d DCA 2009). The fundamental purpose of service is to give proper notice to a defendant in a case so that the party is answerable to the claim of the plaintiff and, therefore, to vest jurisdiction in the court entertaining the controversy. *Shurman v. Atl. Mortg. & Inv. Corp.*, 795 So. 2d 952, 953 (Fla. 2001). Where constructive service is attempted, the trial court must determine both whether the affidavit of diligent search filed by the plaintiff is legally sufficient, and whether the plaintiff conducted an adequate search to locate the defendant. *Giron v. Ugly Mortg., Inc.*, 935 So. 2d 580, 582 (Fla. 3d DCA 2006) (citing *Se. & Assocs., Inc. v. Fox Run Homeowners Assoc., Inc.*, 704 So. 2d 694, 696 (Fla. 4th DCA 1998)). Substitute service is unauthorized if personal service could be obtained through reasonable diligence; the test is "whether the complainant reasonably employed knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances, to acquire the information necessary to enable him to effect personal service on the defendant." *Coastal Capital Venture, LLC v. Integrity Staffing Sols., Inc.*, 153 So. 3d 283, 285 (Fla. 2d DCA 2014) (citations omitted). This is because "there is a strong public policy interest in seeing that a defendant receives notice of any action against him so that he may have his day in court in accordance with due process requirements." *Id.*

Service on a limited liability company pursuant to section 608.463(1)(a), Florida Statutes (2014), which was in effect for service in this case but has since been repealed, may be "in accordance with chapter 48 or chapter 49, as if the limited liability company were a partnership." § 608.463(1)(a), Fla. Stat. (2014); *see 1321 Whitfield, LLC v. Silverman*, 67 So. 3d 435, 436 (Fla. 2d DCA 2011). As section 49.021, Florida Statutes (2014), allows for constructive service on corporations and other legal entities, it authorizes such service on limited liability companies. *1321 Whitfield*, 67 So. 3d at 436.

A prerequisite to constructive service of process is the filing of a sworn statement stating that a diligent search for persons sought to be served has been made. *See* § 49.031, Fla. Stat. (2014). Appellant has cited to the requirements for a diligent search and inquiry for a corporation in section 49.051, Florida Statutes (2014), to show that the Bank did not conduct an adequate search. That section applies to sworn statements where a corporation is a defendant and specifically refers to resident agents. If we

follow section 608.463(1)(a), limited liability companies are to be served in accordance with chapter 48 or chapter 49, as if the limited liability company were a partnership. And section 48.061(2), Fla. Stat. (2014), provides that process against a domestic limited partnership may be served on any general partner or agent.

Regardless, under the constructive service statutes, whether the party to be served is a corporation, partnership, or simply a natural person, a diligent search for the whereabouts of the person to be served is required. *See* §§ 49.041, 49.051, 49.061, Fla. Stat. (2014). For instance, under section 49.051, the sworn statement must state "that diligent search and inquiry have also been made, to discover the names and *whereabouts of all persons upon whom the service of process would bind the said corporation* and that the same is specified as particularly as is known to the affiant[.]" (Emphasis added). Further, that statute requires:

> That all officers, directors, general managers, cashiers, *resident agents*, and business agents of the corporation, either:
>
> (a) Are absent from the state; or
>
> (b) Cannot be found within the state; or
>
> (c) Conceal themselves so that process cannot be served upon them so as to bind the said corporation; or
>
> (d) That their whereabouts are unknown to the affiant.

§ 49.051(3), Fla. Stat. (emphasis added). And in section 49.061(3), Florida Statutes, the sworn statement regarding a party who may have done business in a corporate name must state "[t]he *names, and places of residence if known*, of all persons known to have been interested in such organization, and whether or not other or unknown persons may have been interested in such organization[.]" (Emphasis added).

In *Redfield Investments, A.V.V. v. Village of Pinecrest*, 990 So. 3d 1135, 1138-39 (Fla. 3d DCA 2008), the court considered the adequacy of a diligent search prior to constructive service on a foreign corporation. The court noted that although the plaintiff had made some attempts to locate the defendant, the "sworn statement submitted by Pinecrest is deafeningly silent concerning the most likely source of potential information regarding the '*status' of the corporate defendant or 'persons upon whom the service of process would bind the said corporation.*'" *Id.* (emphasis added). In other

words, the diligent search and sworn statement must include persons upon whom service could be made, such as the officers or resident agent.

Whether the limited liability company is regarded as a corporation or as persons doing business as a corporation or as a partnership, a diligent search must be made for the *individuals* on which service may be made before a resort to constructive service can be upheld. Here, as in *Redfield*, not only is the sworn statement woefully inadequate, it is "deafeningly silent" on any search for the residence or other address for Kaplan, who was both the general manager and resident agent. *Id.* It is apparent that the residence of Kaplan was readily discoverable by simply checking the tax assessor and tax collector records, which the Bank's process server reviewed for appellant, but not for Kaplan. The affidavit on its face is insufficient to permit constructive service because it did not contain any statements that any search at all had been made for *any* individual upon which service could be made.

The Bank contends that attempting service at the street address of the corporation for five days should be sufficient. It is not. The statutes on constructive service must be strictly followed to comply with due process and secure jurisdiction over the party. This was not done, and the trial court erred in denying the motion to quash service.

Reversed.

FORST and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

PRO FINISH, INC.,
Appellant,

v.

ESTATE OF ALL AMERICAN TRAILER MANUFACTURERS, INC., and **JOHN ALAN MOFFA,** as Assignee of the Estate of All American Trailer Manufacturers, Inc.,
Appellee.

No. 4D15-2966

[August 3, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jack B. Tuter, Judge; L.T. Case No. CACE13-026100(07).

Justin C. Carlin of Golden Carlin, Fort Lauderdale, for appellant.

Stephen C. Breuer of Moffa, Bonacquisti & Breuer, PLLC, Plantation, for appellee.

MAY, J.

Failure to strictly adhere to chapter 727's requirements mandates a reversal in this case. A creditor appeals a trial court order approving the assignee's final report, and a second order denying reinstatement of the creditor's lien. We find merit in the creditor's argument that the debtor's assignee failed to comply with chapter 727, Florida Statutes (2013), and reverse.

Pro Finish, Inc. ("creditor") obtained a final judgment against All American Trailer Manufacturers, Inc. ("debtor") for breach of contract and fraud. The creditor filed a motion alleging that, in June 2012, it served a writ of garnishment on a bank holding an account titled in the debtor's name. On June 15, 2012, the debtor petitioned for Chapter 11 bankruptcy. The bankruptcy court ultimately dismissed the case on June 11, 2013.

On May 2, 2013, the creditor filed a judgment lien certificate with the

Florida Secretary of State, Division of Corporations ("May 2, 2013 Lien"), on the debtor's assets. At 10:51 a.m. on November 26, 2013, the creditor filed a judgment lien certificate with the Florida Secretary of State, Division of Corporations ("November 26, 2013 Lien"), on the debtor's assets.

At 5:36 p.m. on November 26, 2013, the debtor's assignee petitioned the trial court for assignment for the benefit of creditors under section 727.104, Florida Statutes ("ABC Proceeding"). He alleged that he became the debtor's assignee, pursuant to a June 11, 2013, assignment ("June 11, 2013 Assignment"). The June 11, 2013 Assignment was not executed until July 15, 2013, but had a stated effective date of June 11, 2013.[1]

On March 6, 2014, the assignee moved to approve sale of assets free and clear of liens, encumbrances, and interests to Bad 2D Bone Trailers, Inc. ("Bad 2D Bone"). The assignee argued that the November 26, 2013 Lien was not secured by the debtor's assets because the creditor filed it months after the June 11, 2013 Assignment. On March 27, 2014, the creditor objected to the assignee's motion and moved to set aside the June 11, 2013 Assignment on the ground that it was invalid, fraudulent, and in contravention of chapter 727, Florida Statutes. It also moved to dismiss the ABC Proceeding.

On September 22, 2014, the trial court heard the assignee's motion to approve sale and the creditor's objections and motion to set aside or dismiss the ABC Proceeding. The creditor's counsel argued the June 11, 2013 Assignment was fraudulent because the assets had been transferred a month before the assignment, the assignee failed to properly record the June 11, 2013 Assignment, and the assignee failed to properly petition for the ABC Proceeding within the statutorily required time.

The assignee responded that the debtor properly assigned the assets to him on May 8, 2014, but the trial court dismissed the original assignment for the benefit of creditor's case due to the pending bankruptcy. The assignee then obtained another assignment on June 11, 2013. Bad 2D Bone was operating with the assets under an "Interim Operating Agreement," until the assignee could sell them. He admitted that a relative of the debtor's principal ran Bad 2D Bone.

The trial court orally overruled the creditor's objections to the sale, approved the proposed sale at the highest appraised price, and denied the creditor's motion to set aside and dismiss the ABC Proceeding. On

[1] The creditor also alleged the June 11, 2013 Assignment was not recorded until February 13, 2014, but the record provided fails to establish this fact.

September 29, 2014, the trial court entered a written order reflecting its oral ruling. The assignee then petitioned for approval of his final report and discharge as assignee. The creditor moved for reinstatement of its May 2, 2013 Lien and objected to the assignee's petition for approval of final report and discharge of assignee.

On June 29, 2015, the trial court entered the Approval Order, which included distributions to the assignee's counsel, the assignee, and the assignee's accountants. The trial court also entered the Order Denying Lien Reinstatement. From these orders, the creditor now appeals.

The creditor argues the trial court erred in entering the Approval Order and in failing to dismiss the ABC Proceeding as invalid and void. It emphasizes that chapter 727 procedures for a debtor's assignment of assets are strictly construed and the debtor's assignee failed to strictly follow the procedures, rendering the June 11, 2013 Assignment invalid. The assignee was required to record the assignment, and file a petition and bond with the trial court within ten days after delivery of the assignment, which it failed to do.

We have de novo review of the trial court's application and interpretation of Chapter 727, Florida Statutes. *Hillsborough Cty. v. Lanier*, 898 So. 2d 141, 143 (Fla. 2d DCA 2005).

Chapter 727 "provide[s] a uniform procedure for the administration of insolvent estates, and . . . ensure[s] full reporting to creditors and equal distribution of assets according to priorities as established under [chapter 727]." § 727.101, Fla. Stat. (2013). Section 727.104(1), Florida Statutes, provides the form of the assignment and requires compliance with it. § 727.104(1), Fla. Stat. (2013); *see Smith v. Effective Teleservices, Inc.*, 133 So. 3d 1048, 1050–51 (Fla. 4th DCA 2014). The June 11, 2013 Assignment did substantially follow the required form.

"Section 727.104 . . . [also] requires the assignee to record the assignment in the public records as well as to file a petition and bond in the circuit court." *Moecker v. Antoine*, 845 So. 2d 904, 910–11 (Fla. 1st DCA 2003). Subsection (2) requires that this be done within ten days after delivery of the assignment to the assignee. § 727.104(2), Fla. Stat.

Here, the record lacks evidence as to when the June 11, 2013 Assignment was recorded. The only record evidence of the June 11, 2013 Assignment is a copy attached to the ABC Proceeding petition. It does not indicate whether or when it was recorded. But, the creditor also argues the assignee failed to file the ABC Proceeding petition within the section

727.104(2) time limits. The creditor suggests the failure to timely petition the trial court for the ABC Proceeding "is in direct contravention of Chapter 727 and violates public policy, which favors the expedient payment of just debts to creditors and prompt notice to creditors of an assignment of the debtor's assets." We agree and reverse.

"There is little case law addressing chapter 727, and none addresses the issues presented here." *Lanier*, 898 So. 2d at 144. However, "the provisions of an assignment which are inconsistent with the applicable statute are void, and the assignment as a whole is void where it fails to comply with such a statute, or is against public policy." 21 C.J.S. Creditor and Debtor § 9 (footnotes omitted).

Here, the assignee failed to file the petition in the circuit court within ten days of delivery of the assignment. The assignee petitioned for the ABC Proceeding on November 26, 2013, and signed the acceptance of the June 11, 2013 Assignment on July 15, 2013. Although the June 11, 2013 Assignment met the section 727.104(1) form requirements, the untimely filing invalidated the ABC Proceeding under section 727.104(2).

Section 727.111, Florida Statutes (2013), required the assignee to also publish notice of the June 11, 2013 Assignment in the newspapers for four consecutive weeks, within ten days of filing the petition, and provide "notice to all known creditors within 20 days after filing the petition." § 727.111(1), Fla. Stat. While the creditor does not argue that the assignee failed to provide notice of the ABC Proceeding, we note that the record shows the publication took place on January 23, 2014, which also violated section 727.111's time limit.

The intent of chapter 727 is to provide a uniform procedure, ensure full reporting to creditors, and ensure equal distribution per priority. § 727.101, Fla. Stat. The assignee untimely petitioned for the ABC Proceeding, and failed to publish notice as required by section 727.111. The assignee's failure to strictly comply with the statutory requirements rendered the assignment invalid and void. The trial court erred in overruling the creditor's objections, approving the sale, and in its final order approving the distribution of assets.

We reverse based upon the debtor's failure to comply with sections 727.104 and 727.111, Florida Statutes. We do not reach the creditor's two remaining arguments.

Reversed and remanded.

GROSS and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.